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COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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| In re HAROLD WRIGHT<br><br>on<br><br>Habeas Corpus. | D052126<br><br>(Imperial County<br>Super. Ct. No. EHC00907) |

Petition for Writ of Habeas Corpus, Jeffrey B. Jones, Judge. Relief granted.

In 1979 petitioner Harold Wright pleaded guilty to two counts of second degree murder and was sentenced to two consecutive terms of 15 years to life. Wright, now 62 years old, has remained in prison for the past 29 years and appears to have been an exemplary prisoner. Although the Board of Parole Hearings (BPH) found him unsuitable for parole at numerous earlier hearings, the BPH found him suitable for parole at his 2007 suitability hearing when it concluded Wright did not pose an unreasonable risk of danger to society if released on parole. However, Governor Arnold Schwarzenegger (the Governor) reversed the BPH's decision, finding Wright posed an unreasonable risk of danger to society if released on parole. After the trial court denied his writ of habeas

corpus challenging the Governor's decision, Wright filed the present petition for writ of habeas corpus.

The Governor found Wright unsuitable for parole primarily because the gravity of the offense convinced the Governor Wright would pose an unreasonable risk of danger to public safety were he released from prison. Wright argues this conclusion has no evidentiary support, and therefore violates his due process right to parole, because this conclusion was improperly based solely on the circumstances of his offense and there is no evidence he currently poses a risk of danger to society. We conclude, under the standards and rationale articulated by *In re Lawrence* (2008) 44 Cal.4th 1181 (*Lawrence*), the relief should be granted.

I

EVIDENCE AT THE SUITABILITY HEARING

A. The Offense

In June 1979 Wright pleaded guilty to two counts of second degree murder. Viewed most favorably to the Governor's ruling, the facts of the offense (derived from the probation officer's report and the prior opinion in this court) are as follows:

Wright had known Katie Allison for several years and their relationship evolved into an affair. However, she ended the affair shortly before January 10, 1979 (the date Wright committed the homicides), and Wright believed Allison then began a relationship with Mr. Urquhart, one of the victims.

Urquhart and Mr. Deal (the other victim) were friends. Both victims had "exchanged words" with Wright on more than one occasion. About two days before the

homicides, both victims had made remarks to Wright that Wright interpreted as threats to himself and his 10-year-old daughter.

On January 10, 1979, Wright entered a bar in which Allison was sitting with Urquhart and Deal. Wright left the bar but returned a few minutes later carrying a pistol. He fired several shots, wounding Urquhart. As the wounded Urquhart moved toward the bathroom, Wright followed and passed Deal, who reached out and spun Wright toward him. The gun fired again, striking Deal. Wright then moved over to Urquhart, who had fallen to the floor. When Urquhart tried to push the gun away, it fired again, striking Urquhart in the chest. Wright pointed the gun down at Urquhart and continued to pull the trigger, but the gun was empty. Wright then left. Urquhart and Deal died of their wounds.

B. Wright's Criminal Background

Wright had no prior history of violence. His sole prior record was a conviction for driving while under the influence, for which he received unsupervised probation.

C. Wright's Performance in Prison

Wright's disciplinary record during his incarceration was nearly flawless: he had only a single "115"[1] during his incarceration and had been free of *any* disciplinary actions for nearly 25 years. He participated in numerous self-help programs, including AA and NA, and he volunteered his time and money to organize a charitable event to

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1 A "115" documents misconduct believed to be a violation of law that is not minor in nature, and a "128" documents incidents of minor misconduct. (*In re Gray* (2007) 151 Cal.App.4th 379, 389.)

help inmates with disabilities. He enhanced his ability to function within the law upon release by obtaining his GED degree in 1995 and by completing vocational training in auto mechanics. He worked as a lead inspector in the institution's license plate factory and also held a position in the textiles department.

D. Psychological Evaluations

Numerous psychological evaluations over the preceding decade concluded Wright presented a low risk for recidivism or violence. As one evaluator explained, the offense occurred during a period in which Wright was experiencing an escalating depressive psychosis; and his alcohol dependence, an unstable love relationship, and his perception of threats from the victims played roles in this aberrant episode of violence. One evaluator stated the absence of these various factors from Wright's life for many years, coupled with Wright's behavioral history and his institutional programming and lack of any psychological disorder, made Wright a low risk for violent behavior. All of the evaluations considered by the BPH agreed Wright presented a low risk for reoffending.

E. Wright's Attitude Toward the Crimes

Wright expressed remorse in describing the murders as "the horror of what I had done." He also expressed understanding that the reasons he killed the victims were his own immaturity, alcoholism, jealousy and perceived fear of the victims. He stated that "[w]ith sobriety and emotional maturity, I'm now the man that I should have been then," and made no effort to deflect responsibility for his actions. The BPH found Wright understood the nature and magnitude of his crimes, accepted responsibility for his conduct, and was remorseful.

F. Wright's Parole Plans

Wright had two brothers who separately offered to provide him with a home and financial support to begin anew were he released from prison. Although Wright did not have a job commitment, he had received training in automotive repair and was described by prison officials as an "excellent worker" and a "consistent, stable, productive worker." His counselor stated Wright "should have no trouble securing a job in the automotive industry with the skills he has developed." The BPH found that, based on his training and offers of family support, Wright had realistic parole plans.

II

HISTORY OF PROCEEDINGS

A. The 2007 BPH Proceedings

Wright had previously been before the BPH eight or nine times, but was denied a parole date on each occasion. At the present parole hearing, conducted in early 2007, Wright's positive psychological assessment from the prior hearing remained unchanged, and his counselor stated Wright had feasible plans for employment. Wright had offers from his family to provide support and a residence were he granted parole. Wright's risk for violence if paroled was assessed as low, because the crimes were committed when Wright was operating under stressors that had since disappeared from his life, and he was able to remain discipline free during his incarceration and to participate in numerous rehabilitative programs.

The BPH, noting the test was whether Wright would pose an unreasonable risk of danger to society or a threat to public safety if released from prison, concluded Wright

was suitable for parole. The reasons cited for this conclusion were many: Wright's lack of a prior record of violence; his stable social history and family ties; his performance in prison; his self-improvement strides in education, sobriety and developing job skills; his maturation and age; his realistic parole plans; his expressed remorse and understanding of his crimes, and acknowledgement of responsibility; and the favorable psychological reports during the prior decade. The BPH also noted the district attorney did not oppose Wright's parole.

The Governor reversed the BPH's grant of parole. The Governor acknowledged the numerous positive factors, including Wright's rehabilitative efforts in prison, the positive evaluations from mental health professionals and prison counselors, his supportive family, his plans for living with family members on release, and his development of marketable skills. However, "despite the[se] positive factors," the Governor concluded the crimes were especially atrocious and callous, which "is alone sufficient for me to conclude presently that his release from prison would pose an unreasonable public safety risk." The Governor also appeared to doubt whether Wright was remorseful and accepted responsibility for the crimes because of Wright's comments at the 2007 suitability hearing.

*The Habeas Proceedings*

Wright petitioned the Imperial County Superior Court for a writ of habeas corpus alleging the Governor violated his due process rights because his unsuitability determination was not supported by the evidence and was therefore arbitrary and capricious. The court denied the petition.

Wright then petitioned this court for a writ of habeas corpus. We issued an order to show cause and the People filed a return. Wright's petition asserts the Governor's decision, premised on the conclusion Wright posed an unreasonable risk of danger to society if released on parole, violated due process because it is contrary to the only reliable evidence of his current dangerousness.

## III

## LEGAL FRAMEWORK

### A. Parole Suitability

Penal Code section 3041 provides the framework for parole decisions for indeterminate life inmates. Subdivision (a) requires that one year prior to the inmate's minimum release date, the BPH meet with the inmate and "normally set a parole release date" according to specified criteria. However, subdivision (b) provides that if the BPH determines the inmate is not suitable for parole because "consideration of the public safety requires a more lengthy period of incarceration," it need not set a release date. (*In re Dannenberg* (2005) 34 Cal.4th 1061, 1078-1080.)

In making the subdivision (b) suitability determination, the BPH is charged with considering "[a]ll relevant, reliable information" (Cal. Code Regs., tit. 15, § 2402, subd. (b); hereafter, reference to section 2042 refers to the regulations), including the nature of the commitment offense, behavior before, during, and after the crime; the prisoner's social history; mental state; criminal record; attitude toward the crime; and parole plans. (§ 2402, subd. (b).) The circumstances that tend to show *unsuitability* for parole include that the inmate: (1) committed the offense in a particularly heinous, atrocious, or cruel

manner;[2] (2) possesses a previous record of violence; (3) has an unstable social history; (4) has previously sexually assaulted another individual in a sadistic manner; (5) has a lengthy history of severe mental problems related to the offense; and (6) has engaged in serious misconduct while in prison. (§ 2402, subd. (c).) A factor that alone might not establish unsuitability for parole may still contribute to a finding of unsuitability. (§ 2402, subd. (b).)

Circumstances tending to show *suitability* for parole include that the inmate: (1) does not possess a record of violent crime committed while a juvenile; (2) has a stable social history; (3) has shown signs of remorse; (4) committed the crime as the result of significant stress in the inmate's life, especially if the stress had built over a long period of time; (5) committed the criminal offense as a result of battered woman syndrome; (6) lacks any significant history of violent crime; (7) is of an age that reduces the probability of recidivism; (8) has made realistic plans for release or has developed marketable skills that can be put to use upon release; and (9) has engaged in institutional activities that evidence an enhanced ability to function within the law upon release. (§ 2402, subd. (d).)

These criteria are "general guidelines," illustrative rather than exclusive, and "the importance attached to [any] circumstance [or combination of circumstances in a

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[2] Factors supporting the finding that the crime was committed "in an especially heinous, atrocious or cruel manner" (§ 2402, subd. (c)(1)), include the following: (A) multiple victims were attacked, injured, or killed in the same or separate incidents; (B) the offense was carried out in a dispassionate and calculated manner, such as an execution-style murder; (C) the victim was abused, defiled, or mutilated during or after the offense; (D) the offense was carried out in a manner that demonstrates an exceptionally callous disregard for human suffering; and (E) the motive for the crime is inexplicable or very trivial in relation to the offense.

particular case] is left to the judgment of the Governor." (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 679 (*Rosenkrantz*); § 2402, subds. (c), (d).) The endeavor of both the BPH and the Governor is to try "to predict by subjective analysis whether the inmate will be able to live in society without committing additional antisocial acts." (*Rosenkrantz,* at p. 655.)

B. Standard of Review

The court below denied relief; therefore, this writ proceeding is an original proceeding that requires we independently review the record. (*In re Scott* (2004) 119 Cal.App.4th 871, 884.)

In *Rosenkrantz*, the California Supreme Court addressed the standard for a court to apply when reviewing a parole decision by the executive branch. The court first held that "the judicial branch is authorized to review the factual basis of a decision of the [BPH] denying parole . . . to ensure that the decision comports with the requirements of due process of law, but that in conducting such a review, the court may inquire only whether some evidence in the record before the [BPH] supports the decision to deny parole, based on the factors specified by statute and regulation." (*Rosenkrantz, supra,* 29 Cal.4th at p. 658.) *Rosenkrantz* held the same standards of review are applicable when a court reviews a Governor's decision reversing the BPH. (*Id*. at pp. 658-667.)

*Lawrence* noted the Supreme Court's decisions in *Rosenkrantz* and *Dannenburg*, and specifically *Rosenkrantz's* characterization of the "some evidence" standard as extremely deferential and requiring "[o]nly a modicum of evidence" (*Rosenkrantz, supra*, 29 Cal.4th at p. 677), had generated confusion and disagreement among the lower courts

"regarding the precise contours of the 'some evidence' standard." (*Lawrence, supra*, 44 Cal.4th at p. 1206.) *Lawrence* explained some courts interpreted *Rosenkrantz* as limiting the judiciary to reviewing whether some evidence exists to support an unsuitability factor cited by the BPH or Governor, while other courts interpreted *Rosenkrantz* as requiring the judiciary to instead review whether some evidence exists to support "the core determination required by the statute before parole can be denied--that an inmate's release will unreasonably endanger public safety." (*Lawrence*, at pp. 1207-1209.)

The *Lawrence* court, recognizing the legislative scheme contemplates "an assessment of an inmate's *current* dangerousness" (*Lawrence, supra*, 44 Cal.4th at p. 1205), resolved the conflict among the lower courts by clarifying the analysis that must be undertaken when reviewing a decision relating to a prisoner's current suitability for parole. That standard is "whether some evidence supports the decision of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings." (*Id*. at p. 1212.) *Lawrence* clarified that the standard for judicial review, although "unquestionably deferential, [is] certainly . . . not toothless, and 'due consideration' of the specified factors requires more than rote recitation of the relevant factors *with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision*--the determination of current dangerousness." (*Id.* at p. 1210, italics added.) Indeed, it is *Lawrence's* numerous iterations (and variants) of the requirement of a rational nexus between the *facts* underlying the unsuitability factor and the *conclusion* of current dangerousness that appear to form the crux of, and provide the teeth for, the

standards adopted in *Lawrence* to clarify and illuminate "the precise contours of the 'some evidence' standard." (*Id.* at p. 1206.)

The implementation of a "rational nexus" standard finds confirmation in *Lawrence's* numerous references to that standard or to functional equivalents of that standard. For example, in at least two other places in the opinion, *Lawrence* reiterated the requirement that there be a "rational nexus" between the facts relied on by the Governor and the conclusion of current dangerousness. (*Lawrence, supra*, 44 Cal.4th at p. 1213 [suggesting court applied inappropriate standard when it affirmed denial of parole "without specifically considering whether there existed a rational nexus between those egregious circumstances and the ultimate conclusion that the inmate remained a threat to public safety"] & p. 1227 ["mere recitation of the circumstances of the commitment offense, absent articulation of a rational nexus between those facts and current dangerousness, fails to provide the required 'modicum of evidence' of unsuitability"].)

Additionally, other critical passages in *Lawrence* reinforce the requirement of some rational connection between the facts relied on and the conclusion of dangerousness. (See, e.g., *Lawrence, supra,* 44 Cal.4th at p. 1211 ["If simply pointing to the existence of an unsuitability factor and then acknowledging the existence of suitability factors were sufficient to establish that a parole decision was not arbitrary, and that it was supported by 'some evidence,' a reviewing court would be forced to affirm any denial-of-parole decision linked to the mere existence of certain facts in the record, even if those facts have *no bearing* on the paramount statutory inquiry"], italics added.)

Indeed, *Lawrence's* "rational nexus" requirement is echoed by its repeated references to a slightly different variant of that concept: whether the factor relied on by the Governor is "probative" of current dangerousness. (See, e.g., *Lawrence, supra,* 44 Cal.4th at p. 1212 [factors will "establish unsuitability if, and only if, those circumstances are probative to the determination that a prisoner remains a danger"], p. 1214 ["the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner's pre- or post-incarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative to the statutory determination of a continuing threat to public safety"] & p. 1221 [the "relevant inquiry for a reviewing court is not merely whether an inmate's crime was especially callous, or shockingly vicious or lethal, but whether the identified facts are *probative* to the central issue of *current* dangerousness when considered in light of the full record"].) Because evidence is "probative" only when it has some "tendency in reason to prove" the proposition for which it is offered (see, e.g., *People v. Hill* (1992) 3 Cal.App.4th 16, 29, disapproved on other grounds by *People v. Nesler* (1997) 16 Cal.4th 561, 582, fn. 5), the *Lawrence* court appears to have employed the terms "rational nexus" and "probative" interchangeably.

After clarifying the applicable standard of review, *Lawrence* addressed how one "unsuitability" factor--whether the prisoner's commitment offense was done in a particularly heinous, atrocious, or cruel manner--can affect the parole suitability

determination and, in particular, whether the existence of some evidence supporting the Governor's finding the offense was particularly heinous, atrocious, or performed in a cruel manner is alone sufficient to deny parole. *Lawrence* concluded when there has been a lengthy passage of time, the Governor may continue to rely on the nature of the commitment offense as a basis to deny parole *only* when there are *other* facts in the record, such as the prisoner's history before and after the offense or the prisoner's current demeanor and mental state, that provide a rational nexus for concluding an offense of ancient vintage continues to be predictive of current dangerousness. (*Lawrence*, *supra*, 44 Cal.4th at pp. 1211, 1214, 1221.)

IV

ANALYSIS

The People do not dispute the evidence on all relevant suitability factors, as well as the only evidence on most of the unsuitability factors, uniformly militated in favor of finding Wright suitable for parole. Notwithstanding this evidentiary context, the Governor found Wright was unsuitable based primarily on the Governor's conclusion that the commitment crimes showed Wright remained a danger to society if released on parole. Because we are charged with the obligation to ensure this decision comports with the requirements of due process of law, and we can discharge that obligation only if we are satisfied there is some evidence in the record before the Governor providing a rational nexus between the evidence and the conclusion of current dangerousness (*Lawrence*, *supra*, 44 Cal.4th at pp. 1211-1212), we examine the articulated grounds to determine if some evidence supports the Governor's decision.

In the present case, paraphrasing *Lawrence*, "[a]lthough the Governor alluded to other possible grounds for denying petitioner's parole, he expressly relied only upon the nature of petitioner's commitment offense to justify petitioner's continued confinement, because [the Governor ruled that] 'the gravity [of Wright's crimes is] alone . . . sufficient . . . to conclude presently that [Wright's] release from prison would pose an unreasonable public-safety risk.' " (*Lawrence, supra*, 44 Cal.4th at p. 1222.) We believe the Governor's express limitation of his finding regarding "current dangerousness" to reliance on the circumstances of Wright's crimes would justify our similarly limiting our review to that factor. However, because the Governor alluded to two (or possibly three) other facts in his decision, and again paraphrasing *Lawrence*, "[b]efore evaluating the Governor's reliance upon the gravity of the commitment offense, we first consider his discussion of facts not related to the circumstances of the commitment offense" (*ibid.*) mentioned in the Governor's decision reversing the BPH's grant of parole to Wright.

"*Lack of Remorse or Acceptance of Responsibility*"

In the present case, as in (and again paraphrasing) *Lawrence*, "[a]lthough his statement does not directly rely upon a lack of remorse to justify denial of parole, the Governor suggested that [Wright] continued to pose a threat to public safety because [Wright] was not remorseful and because [he] continued to attempt to justify the [murders]." (*Lawrence, supra*, 44 Cal.4th at p. 1222.) In the present case, the Governor's decision states "[Wright] says he accepts responsibility for his actions and is remorseful. He nonetheless told the 2007 [BPH] that he acted out of fear, because of threats [the victims] made to [Wright] and his daughter." The People assert these statements by

Wright to the BPH in 2007 provide some evidence Wright currently lacks remorse or has not accepted responsibility for the crimes, and therefore his *current* mental state provides a rational nexus for the Governor to conclude Wright's 30-year old offenses remain predictive of his current dangerousness.

However, the *Lawrence* court addressed a closely analogous statement by the petitioner in that case. In *Lawrence*, the "Governor pointed to quotations excerpted from the proceedings at petitioner's 2002 and 2005 Board hearings, such as petitioner's observation at the latter hearing that ' "I always viewed [Mrs. Williams] as the obstacle in my fantasy romance. That she was the one that was keeping me from having what I wanted. So in my mind, it was natural for me to confront her as though she would disappear . . . ." [Petitioner also] said that she saw [the victim] as her "problem." ' " (*Lawrence, supra,* 44 Cal.4th at p. 1222.) The *Lawrence* court reviewed the record as a whole to place these statements by the petitioner in context rather than in isolation, and then rejected the claim these statements showed lack of remorse, stating:

> "We agree with the Court of Appeal majority that it is evident from the full context of petitioner's statements that *she merely was explaining her state of mind at the time of the homicide, not justifying it*. 'To the contrary, these and like statements were made in the course of condemning her own behavior on that occasion and expressing deep remorse for what she had done and why she had done it.' Additionally, as the Court of Appeal recognized and as the record amply demonstrates, petitioner consistently, repeatedly, and articulately has expressed deep remorse for her crime as reflected in a decade's worth of psychological assessments and transcripts of suitability hearings that were before the Board. Accordingly, the Governor's conclusion that petitioner showed insufficient remorse is not supported by any evidence; rather, it is clearly contradicted by abundant evidence in the record. (*Rosenkrantz, supra,* 29 Cal.4th at p. 681 [upholding the Governor's decision but finding 'no evidence

> supporting the Governor's additional determination that petitioner has continued . . . to avoid responsibility for his crime by lying about pertinent events or by improperly attempting to portray himself as a victim'].)" (*Lawrence*, at pp. 1222-1223, fns. omitted.)

Here, as in *Lawrence*, the snippet of Wright's statements to the BPH mentioned by the Governor, and relied on by the People as showing an absence of remorse, has been wrenched from context. Wright was responding to a direct question from the presiding commissioner at the 2007 BPH hearing, which asked "[w]hy did you shoot and kill . . . these two people?" and Wright responded, "If you ask me if I remember committing this crime, the answer is no. As for the reasons, it's my belief that it was my immaturity, my alcoholism--that's emotional immaturity. . . . There was a conflict between me and Mr. Urquhart over a woman, and there was an insinuated threat against one of my children, and I wanted to kill these two men." The Governor and the Attorney General overlook that the snippet was uttered because Wright, like the prisoner in *Lawrence*, was "explaining [his] state of mind at the time of the homicide, not justifying it." (*Lawrence, supra*, 44 Cal.4th at p. 1222.) The BPH had before it numerous favorable psychological evaluations of Wright spanning nearly a decade and, like the situation in *Lawrence*, the BPH understood the *context* within which Wright mentioned the "threat" and found Wright remorseful. "[H]e understands the nature and magnitude of the offense and accepts responsibility for the crime . . . ." We conclude, again paraphrasing *Lawrence*, "the Governor's [implied] conclusion that [Wright] showed insufficient remorse is not supported by any evidence; rather, it is clearly contradicted by abundant evidence in the record." (*Id*. at p. 1223.)

"*Lack of Realistic Parole Plans*"

The People argue the Governor properly relied on Wright's lack of a current job offer to conclude he posed a current danger to society. We reject this claim, for several reasons. First, the Governor's allusion to the absence of a current job offer was included within the Governor's recitation of the "various positive factors" he considered. We understand this reference to be a caveat to Wright's development of marketable skills, *not* a factor on which the Governor relied to conclude Wright was currently dangerous.[3] Moreover, this statutory factor focuses on whether the prisoner has "made realistic plans for release or has developed marketable skills that can be put to use upon release" (§ 2402, subd. (d)(8)), not on whether an employer has tendered a job offer to a person whose availability is problematic. Because the BPH found, and the Governor did not dispute, both that Wright had "realistic plans for release" (based on the offers of shelter and support from family members with whom he had maintained strong ties) as well as "marketable skills" (prompting one of the counselors to conclude Wright "should have no trouble securing a job in the automotive industry with the skills he has developed," this factor supports rather than undermines Wright's suitability for parole.

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3 Specifically, the Governor's discussion of the factors making Wright suitable for parole noted Wright's nearly discipline-free history, his obtaining a GED, and his participation in self-help programs such as AA and NA. The Governor then stated, "[a]dditionally, Mr. Wright . . . maintains seemingly solid relationships with supportive family members and friends. He also made plans upon his release to live with family in Imperial County . . . . Although Mr. Wright has marketable skills[,] he did not secure employment in Imperial County. Having a legitimate way to provide financial support for himself immediately upon his release is essential to Mr. Wright's success on parole." After the above recitation, the Governor then stated that "[d]espite the positive factors I considered," Wright was unsuitable for parole because of the heinousness of the crime.

Most importantly, as *Lawrence* repeatedly emphasized, there must be some rational nexus between the fact found and the conclusion that Wright would pose a danger to society if released. We cannot perceive any rational nexus between the fact that Wright would need to engage in job-hunting on his release and the conclusion that such job-seeking meant Wright was a danger to society.[4] Certainly, the only evidence was that Wright would *not* on release be destitute (because the only evidence was that he had offers of shelter and financial support to assist his transition while he sought work), and there is nothing in Wright's pre-incarceration activities even hinting that he used criminal activity rather than gainful employment to support himself. Because he had developed marketable skills and his institutional behavior showed he was an "excellent" worker, and every other consideration showed an unblemished record of rehabilitative strides, the fact Wright would be required to seek work after being released is not

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4 The People, noting *Lawrence* cited *In re Honesto* (2005) 130 Cal.App.4th 81 with approval, argue Wright's absence of an existing job offer is analogous to the prisoner's lack of realistic parole plans in *Honesto* and constitutes a ground for finding unsuitability. However, *Honesto* had other unsuitability factors present, including a lengthy criminal record and a failure to engage in adequate reformatory efforts while incarcerated. (*Id*. at p. 97.) Moreover, *Honesto* involved an absence of "realistic parole plans" because there was no evidence he had current offers of housing or support if he were released, in contrast to the uncontradicted evidence here. (*Ibid.*) The People also suggest that because Wright committed the offenses after experiencing problems finding employment in the years preceding the offenses, the adverse impact on Wright's mental state from unemployment could justify the Governor in concluding his current lack of employment made Wright dangerous. However, the evidence showed Wright had experienced a physical disability (from an injury to his knee sustained in a car accident) that prevented him from handling the rigors of working at that time, and there is no evidence of any lingering disability currently presenting similar impediments were he released on parole, and there is no other evidence that his plans for parole are not "realistic."

"probative to the determination that [he] remains a danger" if released on parole. (*Lawrence, supra*, 44 Cal.4th at p. 1212.)

"*Prior Record*"

The People argue the Governor properly relied on Wright's prior record to conclude he posed a current danger to society. We reject this claim, for several reasons. First, the undisputed evidence was that Wright's prior record of conviction was a single driving while under the influence offense over 30 years ago, for which Wright received summary probation.[5] Although a previous record of *violence* (§ 2402, subd. (c)(2)) may be the type of fact *Lawrence* recognized as "something in the prisoner's pre- or post-incarceration history. . . [that] indicates that the implications regarding the prisoner's

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[5] The People suggest the Governor could properly rely on Wright's admission he was arrested for his involvement in a fist fight when he was a juvenile. First, because this incident did not result in any criminal charges (and indeed was not even mentioned in the probation officer's sentencing report submitted to the court in connection with Wright's sentencing on the murder charges), it is impossible to determine whether Wright was a victim in that incident who engaged in self defense or was instead an aggressor. Moreover, the only *evidence* concerning that incident was that Wright was told by the authorities that if he " 'stay[ed] out of trouble . . . we'll forget about it,' " and that he did so for at least a decade. *Lawrence* specifically acknowledged that "[i]n light of petitioner's extraordinary rehabilitative efforts specifically tailored to address the circumstances that led to [his] criminality, [his] insight into [his] past criminal behavior, [his] expressions of remorse, [his] realistic parole plans, the support of [his] family, and numerous institutional reports justifying parole, as well as the favorable discretionary decision[] of the Board . . . the unchanging factor of the gravity of petitioner's commitment offense has no predictive value regarding [his] *current* threat to public safety, and thus provides no support for the Governor's conclusion that petitioner is unsuitable for parole . . . ." (*Lawrence, supra*, 44 Cal.4th at p. 1226.) If the predictive value of a violent offense *for which he was charged and convicted* substantially diminishes after many years of unblemished conduct, a fortiori the predictive value of an incident of even more ancient vintage--for which he was *not* convicted nor even charged--would provide even less evidentiary support for the Governor's conclusion that Wright is unsuitable for parole.

dangerousness that derive from his or her commission of the commitment offense remain probative to the statutory determination of a continuing threat to public safety" (*Lawrence, supra,* 44 Cal.4th at p. 1214), Wright's DUI conviction contains no suggestion of violence, and his postincarceration history shows both an absence of any violent character and a commitment to sobriety unquestioned by the Governor. We therefore reject the argument that Wright's single DUI offense is "probative to the determination that [he] remains a danger" if released on parole. (*Lawrence,* at p. 1212.)

"*Circumstances of the Offense*"

We conclude, as did the *Lawrence* court, that all of the noncommitment offense factors adverted to in the Governor's decision--even if the Governor had specifically relied on them--do not have the requisite "rational nexus" to the *conclusion* of current dangerousness. We also acknowledge, as did *Lawrence, supra,* 44 Cal.4th at page 1224, that the Governor's finding the commitment offenses were particularly heinous, atrocious, or cruel is supported by some evidence, but:

> "As noted above, . . . few murders do not involve attendant facts that support such a conclusion. As further noted above, the mere existence of a regulatory factor establishing unsuitability does not necessarily constitute 'some evidence' that the parolee's release unreasonably endangers public safety. [Citation.] Accordingly, even as we acknowledge that some evidence in the record supports the Governor's conclusion regarding the gravity of the commitment offense, we conclude there does not exist some evidence supporting the conclusion that petitioner *continues* to pose a threat to public safety." (*Id.* at p. 1225.)

Here, as in *Lawrence,* the BPH found all of the factors listed in the regulations supporting suitability for release on parole (except for the factor applicable only to

battered spouses and to life stresses at the time of the crime) militated in favor of suitability. As in *Lawrence*, the BPH recognized Wright's long-standing involvement in self-help, vocational and educational programs; his insight into the circumstances of the offense; his acceptance of responsibility and remorse; and his realistic parole plans. As in *Lawrence*, Wright had no prior criminal record of violent crimes or assaultive behavior or any juvenile record, and showed no evidence of an unstable social history. (*Lawrence, supra,* 44 Cal.4th at pp. 1193, 1225.) As in *Lawrence*, Wright's psychological examinations had been uniformly positive for many years, finding him psychologically sound and presenting no unusual danger to public safety should he be released. As in *Lawrence,* Wright had been free of "serious misconduct" for over two decades of incarceration, and exhibited exemplary efforts toward rehabilitative programming. Also as in *Lawrence*, the BPH found Wright's advanced age reduced the probability of recidivism. Finally, as in *Lawrence*, the BPH found no evidence establishing the existence of any other statutory factor, apart from the commitment offense, relevant to an inmate's suitability for parole. (*Id.* at pp. 1225-1226.)

Under these circumstances, we adhere to our Supreme Court's instruction in cases like the present one that, although:

> "Our deferential standard of review requires us to credit the Governor's findings if they are supported by a modicum of evidence. [Citation.] This does not mean . . . that evidence suggesting a commitment offense was 'especially heinous' or 'particularly egregious' will eternally provide adequate support for a decision that an inmate is unsuitable for parole. As set forth above, the Legislature specifically contemplated both that the Board 'shall normally' grant a parole date, and that the passage of time and the related changes in a prisoner's mental attitude and demeanor are

> probative to the determination of current dangerousness. When, as here, all of the information in a postconviction record supports the determination that the inmate is rehabilitated and no longer poses a danger to public safety, and the Governor has neither disputed the petitioner's rehabilitative gains nor, importantly, related the commitment offense to current circumstances or suggested that any further rehabilitation might change the ultimate decision that petitioner remains a danger, mere recitation of the circumstances of the commitment offense, absent articulation of a rational nexus between those facts and current dangerousness, fails to provide the required 'modicum of evidence' of unsuitability. [¶] Accordingly, under the circumstances of the present case--in which the record is replete with evidence establishing petitioner's rehabilitation, insight, remorse, and psychological health, and devoid of any evidence supporting a finding that [he] continues to pose a threat to public safety--petitioner's due process and statutory rights were violated by the Governor's reliance upon the immutable and unchangeable circumstances of [his] commitment offense in reversing the Board's decision to grant parole." (*Lawrence*, *supra*, 44 Cal.4th at pp. 1226-1227.)

*Conclusion*

We conclude, under the standards adopted by *Lawrence* and the application of those standards to almost identical facts, the Governor's decision is not supported by some evidence and therefore violated Wright's due process rights.

DISPOSITION

The People suggest, at a minimum, the proper remedy is not to reinstate the BPH decision. Instead, the People argue, we should remand the matter to the Governor to allow him to reconsider it in light of *Lawrence* and *In re Shaputis* (2008) 44 Cal.4th 1241, because his decision in this matter predated and was made without the benefit of those decisions. However, when the *Lawrence* court found (as we do here) there was no evidence on which the Governor properly could have reversed the BPH's decision, it

simply affirmed the appellate court's decision reinstating the BPH decision granting parole to the prisoner, even though the Governor's decision necessarily predated the Supreme Court's opinion. Because nearly two years have elapsed since the BPH decided to release Wright on parole, during which time he has remained incarcerated despite the absence of any evidence that he is unsuitable for parole, we decline the People's invitation to extend Wright's incarceration.

The Governor's decision reversing the 2007 BPH decision finding Wright suitable for parole and setting a parole date is vacated. As in *People v. Elkins* (2006) 144 Cal.App.4th 475, 503, the BPH is ordered to release Wright forthwith pursuant to the conditions set forth in the 2007 decision by the BPH. Because Wright's release would have been final nearly two years ago, and in the interests of justice, this opinion shall be final as to this court immediately. (Cal. Rules of Court, rule 8.264(b)(3).)

McDONALD, J.

I CONCUR:

McINTYRE, J.

I CONCUR IN THE RESULT:

HUFFMAN, Acting P. J.